United States Supreme Court,

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD COMPANY, Appellant, *against* CORNELL STEAMBOAT COMPANY, Claimant, Tug IRA M. HEDGES, etc., Appellee.	No. 448.

MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS.

The mere fact that the preamble of the libel states the cause of action as one of collision, or that appellant contended in the Court below that the cause was one of contribution, does not necessarily give the District Court jurisdiction of the subject matter.

The question is : do the facts alleged in the libel give the Court jurisdiction ?

Take the case of an action brought in Admiralty upon a non-maritime contract. The preamble in such a case would probably be the time-honored one of "In a cause of contract, civil and maritime."

Such language would not of itself give the Court jurisdiction of the subject matter.

Again, the libel might state a cause of action on the contract, but admiralty would have to decline jurisdic-

tion because of the non-maritime character of the contract.

By so doing the Court would simply hold that an admiralty court had no jurisdiction, because the libel had not stated a cause of action within the admiralty jurisdiction.

Here the Court below has held that on the facts alleged it had no jurisdiction.

It does not hold that the cause of action was one for contribution and that no cause of action for contribution is stated in the libel.

What it does hold is that admiralty has no jurisdiction over an alleged cause of contribution where one of the parties has elected to take advantage of his constitutional right to pursue the common law remedy.

In other words, that admiralty had no right or jurisdiction to interfere after one of the parties had pursued his common law remedy.

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in a given case."
>
> *Reynolds* vs. *Stockton*, 140 U. S., at p. 268.

Here the District Court has expressly held that it had no right to adjudicate concerning the subject-matter.

It is in this that the case at bar seems to us to differ from the cases cited on appellee's brief, *i. e.*, *Smith* vs. *McKay*, 161 U. S., 355, and *Blythe* vs. *Hinckley*, 173 U. S., 501.

In *Smith* vs. *McKay*, at page 357, it appears that

> "The defendants below appealed upon the express ground that the court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction, and prayed that their appeal should be allowed, and *the question of jurisdiction* be certified to the Supreme Court, and that *said appeal was allowed.*"

In *Blythe* vs. *Hinckley*, the Circuit Court dismissed the bill on the ground that the remedy was at law and not in equity, but it appeared further that the Circuit Court dismissed the bills on another ground, *i. e.*, that the judgments of the State Court could not be reviewed by that court on the reasons put forward.

Blythe vs. *Hinckley*, 173 U. S., at p. 507.

In neither of those cases was there a certificate that the lower court had dismissed the cause solely on the ground that the court had no jurisdiction.

Here, the District Judge held in his opinion that there was no jurisdiction; the final decree was entered and a certificate was granted solely upon that ground.

Under such circumstances what could the appellant do but prosecute this appeal?

In view of the opinion of the District Judge and the entry of the final decree on the ground that the Court had no jurisdiction, if this Court should dismiss this appeal it is possible that the appellant would be barred from having the District Judge's opinion reviewed at all, because the Act of March 3, 1891, Chap. 517, Sec. 5 (26 U. S. Stat., at p. 827), provides:

> "That appeals or writs of error may be taken from the District Court, or from the existing Circuit Court direct to the Supreme Court in the following cases:
>
> In any case in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision."

And Section 6, at p. 828, provides:

> "That the Circuit Court of Appeals established by this Act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Court in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law, * * *."

Under this language, should the appellant take an appeal to the Circuit Court of Appeals, that Court might very well say that the opinion of the District Judge having been that there was no jurisdiction, and the decree entered and a certificate given solely upon that ground, it was barred by Section 6 from entertaining an appeal from the final decree of the District Court.

Manifestly, under the circumstances of this case, it would be a very great hardship to dismiss its appeal, *with costs.*

The motion to dismiss should be overruled.

Respectfully submitted,

GEO. H. EMERSON,
Counsel for Appellant.

W. S. MONTGOMERY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted]18.

LEHIGH VALLEY RAILROAD COMPANY, Appellant,

vs.

CORNELL STEAMBOAT COMPANY, CLAIMANT OF STEAMTUG "IRA M. HEDGES," &c., Appellee.

MOTION TO DISMISS, OPPOSING MOTION TO ADVANCE.

AMOS VAN ETTEN,
Proctor for Claimant-Appellant,
Kingston, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD COMPANY, *Appellant*,
against
THE CORNELL STEAMBOAT COMPANY, Claimant, etc.,
Appellee.
No. 448.

PLEASE TAKE NOTICE that at the opening of court on October 12, 1908, or as soon thereafter as counsel may be heard, I shall present a motion to dismiss the appeal herein upon the ground that it appears on the face of the record that the question involved is not one of jurisdiction within the meaning of the Judiciary Act of 1891, permitting appeals to the Supreme Court from the District Court on the question of jurisdiction.

Yours. &c.,
AMOS VAN ETTEN,
Proctor for Appellee,
22 Ferry Street,
Kingston, N. Y.

To
GEO. H. EMERSON, Esq.,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD COMPANY, *Appellant*, *against* THE CORNELL STEAMBOAT COMPANY, Claimant, etc., *Appellee.*	No. 448.

And now comes the respondent, Cornell Steamboat Company, and respectfully moves the court to dismiss the appeal of the Lehigh Valley Railroad Company in this action upon the ground that the question involved and certified is one of general maritime law and not a question of the jurisdiction of the Court. The United States District Court had jurisdiction of the parties and had jurisdiction of the subject matter which was, as appears from the libel, a cause of collision. The exception of the defendant raised the questions that no cause of action was stated in the libel and further that the matters therein were not within the jurisdiction of the court as set forth in the alleged cause of action, which, as appears from the libel, was of a different nature from that stated in the certificate. Quoting from the opinion of the District Judge (Transcript of Record page 6) "*While the libel "on its face would seem to claim a right to recover "what it has been obliged to pay, yet it is urged that "it only seeks contribution.*"

The question certified therefore arose upon the hearing in the District Court. The certificate filed states that the libel was dismissed and final decree given solely because the United States District Court sitting as a court of admiralty had no jurisdiction to

enforce contribution between joint tort-feasors where the common law remedy had been successfully invoked against the joint tort feasor seeking to enforce the contribution. In so far as such question was concerned the court had jurisdiction of the parties and of the subject matter. The position of the appellant and the authorities cited by him confirm the jurisdiction of the court. If the court erred in determining the question as a matter of maritime law, the appeal from that decision would lie to the Court of Appeals and not to this court.

Smith vs. McKay, 161 U. S., 355.
Blythe vs. Hinckley, 173 U. S., 501.

WHEREFORE the respondent prays that the said appeal may be dismissed with costs.

AMOS VANETTEN,
Proctor for Cornell Steamboat Company, Appellee.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD COMPANY, *Appellant*, *against* THE CORNELL STEAMBOAT COMPANY, Claimant, etc., *Appellee*.	No. 448.

And now comes the Cornell Steamboat Company, the appellee, in opposition to the motion to advance this cause and prays that such motion be denied, or, if granted, that the appellee have opportunity to make argument or submit a brief on the merits within such time as may seem to the court proper.

Respectfully submitted,

AMOS VAN ETTEN,
Proctor for Appellee.

Supreme Court of the United States.

LEHIGH VALLEY RAILROAD COMPANY,
Appellant,

against

CORNELL STEAMBOAT COMPANY,
Claiment of Steamtug *Ira M. Hedges*, etc.,
Appellee.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT.

The arguments of the appellant upon the merits are fully set forth in its brief attached to its motion to advance, and its contentions in opposition to the motion of the claimant to dismiss the appeal upon the ground that the jurisdiction of the District Court is not involved are fully set forth in its memorandum opposing the motion to dismiss. There are, however, a few additional suggestions with regard both to the merits and to the motion to dismiss, which we wish to bring to the Court's attention.

First.—As to the motion to dismiss.

Our view that the question here involved is one of jurisdiction, is, we think, supported by *Hughes on Admiralty*, where, in considering the question of contribution, it is said at page 285:

> "Whether this can be done in admiralty or not is a question of first impression, so far as known to

the writer. It would seem on principle that such a suit would lie even in the admiralty. If the Supreme Court, by rule, can confer jurisdiction on an admiralty court to bring the other vessel in by petition, as is done by the 59th Rule, that at least shows that the right is one of admiralty character, for a Supreme Court cannot by rule make a thing maritime which is not so by nature. It can only give a maritime remedy to a right maritime by nature. It has been seen in another connection that where a salvor collects the entire salvage due, his co-salvors can sue him in admiralty to enforce an appointment or contribution, and this would seem to be a similar case. Admiralty has undoubted jurisdiction to compel contribution in cases of general average, and the doctrine now under discussion originated in the law of average. It is believed, therefore, that it will be finally settled as the law that contribution may be enforced in an admiralty proceeding, probably *in rem*, and certainly *in personam*, as between the owners of two colliding ships, where one has been compelled to pay more than his share. It seems a necessary corollary from the doctrine that a decree is for half against each, with a remedy over, thus making it a case where one is necessarily surety for the other in case of a deficit."

Whatever doubt may have existed in regard to the over-ruling of the motion to dismiss, has, we think, been set at rest by the opinion of this Court in the case of *The Jefferson*, 215 U. S., p. 130. In that case the libel was dismissed by the District Court for want of jurisdiction. The appellee there, as here, contended that the appeal was wrongfully allowed, because, although in form of expression the Court below dismissed the libel for want of jurisdiction, its action was based really upon the conclusion that the facts alleged were insufficient to authorize a recovery, even though the case were within the jurisdiction of the Court.

While in this case the cause of action has been formally

stated by the pleader as one of collision, it is clear from the facts alleged that the relief sought is a decree for contribution, and therefore the action is really one for contribution between joint tort feasors to a maritime tort and so is within the admiralty jurisdiction. The exceptions to the libel challenged the jurisdiction of the Court over the cause of action asserted in the libel, because the action was for contribution by a joint tort feasor who had been proceeded against at common law; and they also raised the question of the sufficiency of the facts alleged to constitute a cause of action. It is evident, both from the opinion of the Court and the certificate, that the District Judge considered that the libel stated sufficient facts to constitute a cause of action for contribution, but that he had no power to enforce such contribution. The District Judge's theory being that, since the tort feasor suing for contribution had been proceeded against at common law, there was no jurisdiction in admiralty to allow a recovery, because to do so would defeat the common law doctrine of no contribution between joint tort feasors.

Should the motion to dismiss be granted, the result would be highly inequitable; because the libellant would then be barred from any chance of a recovery, although the District Judge considered the libel stated a good cause of action, and would have permitted the action to proceed to a trial on the merits, but for the fact that he thought he had no power to enforce contribution in view of the facts alleged in the libel.

Second.—As to the merits.

It is said in *Hughes on Admiralty*, in considering the rule of the division of damages, page 276:

> "An examination of these old codes reveals another very important fact in relation to it, and that is that it originated, not in the law of torts, but in the law

> of average. It is under that head in the Ordinances of Louis XIV., and the language of others shows that it was treated as a *contribution* [italics ours], and not as a mere liabilitity on the ground of tort."

The view that the origin of the rule of division of damages is in the law of average is sustained by the dicision of this Court in *The North Star* (106 U. S., 17), in which case Mr. Justice Bradley said at page 20:

> "On the contrary, the almost invariable mode of statement is that the joint damage is equally divided between the parties; or (*as in some authorities*) *it is spoken of as a case of average* [italics ours]."

Contribution among joint tort feasors in admiralty, being really a corollary of the rule of division of damages, therefore has its origin in the law of averages, and it seems to us that the language of Mr. Hughes [writing before the decision in *The Mariska* (107 Fed. Rep., 989) and *Erie R.R. Co.* vs. *Erie Transportation Co.* (204 U. S., 220)], in his book on Admiralty sets forth clearly the logical result of the doctrine that contribution has its origin in the law of averages:

> "If these last three cases are right, it would seem to follow as an irresistable conclusion that an action for contribution ought to lie by one vessel against the other. The fact that there is no privity between them is immaterial: for general average and contribution do not depend upon questions of privity or contract, but upon principles of natural justice. Indeed the very fact that they were not intentionally concurring in the act complained of is the reason why there should be contribution and why the common law rule does not apply. Hence the reasoning of the Pennsylvania Judge that the right could only be claimed derivatively through the libellant is counter to the original principles on which the doctrine was based. It has been seen that it arose from a desire of the admiralty courts to adjust equitably the relation between the two vessels them-

selves, and not through any consideration of the rights of a third party against them, for his rights are unaffected by the doctrine. And the other reason given in the two cases above cited, holding the adverse doctrine that there is no contribution against tort feasors, is counter to the preponderance of authority, even at common law, which is to the effect that, where the act was not intentional, there may be a contribution between tort feasors.* Hence it is believed that when the question arises, untrammeled by other questions, and is fully presented, the courts will settle upon the doctrine that one of the two vessel owners may proceed against the other to compel a contribution.''

Hughes on Admiralty, p. 284.

*See *Erie R.R. Co.* vs. *Erie Trans. Co.*, 204 U.S. at p. 225.

The right, therefore, to contribution arises, not by reason of the procedure or manner of enforcement, but it comes into existence at the inception of the tort; and an admiralty court has the same power to enforce that right where one only of the joint tort feasors has been proceeded against at the common law, as it has to enforce that right where one only of the joint tort feasors has been proceeded against in admiralty.

Respectfully submitted,

W. S. MONTGOMERY,
Proctor for the Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

LEHIGH VALLEY RAILROAD COMPANY, Libelant-Appellant. AGAINST The Steamtug IRA M. HEDGES, her engines, tackle, etc., THE CORNELL STEAMBOAT COMPANY, Claimant-Appellee.	No. 18.

BRIEF FOR THE APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the District Court for the Southern District of New York entered on exceptions filed by the claimant upon the grounds (1) that the libel did not state a cause of action and (2) that the matters therein set forth were not within the jurisdiction of the

District Court. Pp. 3, 9. The decree states that the dismissal of the libel is based on the ground that the Court was without jurisdiction, p. 9, and the certificate of the District Judge contains a similar statement. P. 14.

The libel alleges that the Lehigh Valley Railroad Company, libelant, is a corporation of the State of New Jersey, and that at the times mentioned in the libel it was in possession of the tug *Slatington* under a charter of demise. It then states that on June 7, 1904, at about 6.10 P.M. the *Slatington* left Pier 44, North River, with car-float *No. 22* alongside, on the port side, bound for the Lehigh Valley terminal at Jersey City. When about midstream, and headed toward the Jersey shore, the tug *Ira M. Hedges* was seen coming up stream well off on the port side. The *Hedges* had two stone scows in tow; one on each side. In this situation the *Slatington* blew a signal of one blast, but this signal was not answered by the *Hedges* which continued on her course. The *Slatington*, receiving no answer, and seeing that the *Hedges* had not changed her course was stopped, alarm whistles were blown, and the engines were put in reverse motion; but the starboard corner of the scow *Helen* on the starboard side of the *Hedges* collided with the port corner of float *No. 22*, damaging the scow and causing some damage to the guard-rail on car-float *No. 22*.

The libel further asserts that, subsequently, the Rockland Lake Trap Rock Company, owner of the scow *Helen*, brought an action in the Supreme Court of New York for Rockland County, against the libelant, Lehigh Valley Railroad Company, to recover the damages sustained by the scow *Helen* in the collision; that on the second trial of the action a verdict was rendered in favor of the plaintiff against the Lehigh Valley Railroad Company, this libelant, for the damages sustained by the scow *Helen;* and that thereafter the costs were taxed, and a judgment was entered, on June 10, 1907, against the railroad company for the damages sustained by the scow *Helen*, with interest and costs, in the sum of $1,209.31, which judgment the libelant thereafter paid; and that the libelant expended in defending such action, in counsel fees, witness fees and other expenses, the sum of $719.

In conclusion it was alleged that "the said collision and the damages consequent thereon were caused or contributed to by the negligence of the tug *Ira M. Hedges*, or those in charge of her navigation," in certain stated particulars.

The prayer of the libel was "that process in due form of law according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue out of and under the seal of the said Court against the steamtug *Ira M. Hedges*, her engines, boiler, tackle, etc., and

that said steamtug, her engines, boiler, tackle, etc., may be seized and sold *to pay the amount of the claim set forth in this libel*, together with interest and costs, and for such other and further relief as may appear to this Honorable Court to be just and proper."

The exceptions filed by the claimant were expressed as follows:

"The Cornell Steamboat Company appears specially in this action and excepts to the libel filed herein in this Court on the ground that the same does not state a cause of action and the matters therein set forth are not within the jurisdiction of this Court; wherefore this claimant prays that the libel herein be dismissed with costs."

The exceptions were duly brought on for hearing. Judge Adams subsequently filed an opinion sustaining the exception to the jurisdiction. Pp. 4-8. The final decree, which was entered on the opinion, sustained the exception to the jurisdiction, and dismissed the libel on the ground that the Court was without jurisdiction.

Neither in the opinion nor in the final decree was any ruling made on the exception that the libel did not state a cause of action.

The ground of the decision, as it appears from the opinion, was that the cause of action, whether viewed as a claim for indemnity, or for contribution, was not maritime in character.

The libelant appealed to this Court on the question of jurisdiction, and subsequently also sued out an appeal to the Circuit Court of Appeals for the Second Circuit from the same decree.

During the October Term, 1908, the libelants made a motion to advance and submit the cause in comformity with Rule 32 of this Court. The defendant at the same time presented a motion to dismiss the appeal on the ground that it appeared on the face of the record that the question involved was one of jurisdiction within the meaning of the judiciary act of 1891 permitting appeals to the Supreme Court from the District Court on questions of jurisdiction.

The appelant's motion was denied. The consideration of the motion of the claimant was postponed until the hearing on the merits.

FIRST POINT.

THE CLAIMANT'S MOTION TO DISMISS SHOULD BE GRANTED.

The libel was expressed to be "in a cause of collision, civil and maritime." It prayed for the arrest of the tug *Hedges* under process in the usual form. The claimant appeared specially and claimed that a cause of action was not stated against the tug and that the matters stated in

the libel were not within the jurisdiction of the Court.

The first ground of exception raised the point that the cause of action stated in the libel did not give rise to a maritime lien, and that, accordingly, it afforded no foundation for a proceeding *in rem* against the tug. Though the District Judge did not discuss this matter in his opinion, it was duly raised before him and was necessarily involved in the case.

The action, as stated in the libel, was manifestly one to recover indemnity for the amount of the judgment for damages, costs and interest, and for the amount spent by the libelant in the defense of an action at law.

Though the claim involved in the action at law was maritime in the sense that it could have been sued on in admiralty, yet it was an action in tort in respect of which the plaintiff was entitled to pursue his remedy at law. When the claim became merged in the judgment, and extinguished by payment, it lost its maritime character. If the plaintiff had failed to collect the judgment at law, it could not have maintained an action in admiralty against the libelant's tug *Slatington* based on the judgment. Nor could it have maintained an action against the *Slatington* in admiralty on the original cause of action. It could not thereafter have sued the *Hedges* on the original cause of action. The judgment at law would have

barred such subsequent suits. *Brinsmead* v. *Harrison*, L. R. 7, C. P., 190.

If we are correct in these assumptions, it would seem to follow that the maritime nature of the claim which the plaintiff originally had against the *Slatington* and her owner became merged in the judgment, and that thereafter it became merely a legal claim on the judgment itself, which was extinguished by payment.

The libelant by paying the legal demand against it, under the judgment, could not change the character of the demand so as to restore its maritime character in such sense that he could claim a maritime lien against the tug *Hedges* for the whole or any part of the judgment.

The libel did not state a cause of action *in rem* against the tug, and hence the libel should have been dismissed on this ground. The fact that the Judge did not pass on this point, which was properly raised by the first ground of exception, is unimportant. The claimant is none the less entitled to urge that ground in support of the decision dismissing the libel. The first ground of exception, however, did not purport to raise a question of jurisdiction in the sense of the statute which permits appeals to this Court on the question of jurisdiction. It merely raised the point that the libelant had not set forth facts which justified him in proceeding against the steam tug *Ira M. Hedges* in a proceeding *in rem*.

If such a point raised by exception presents a question of jurisdiction, it would seem to follow that an appeal could be taken to this court from every decree in admiralty in which the existence of a maritime lien is claimed and denied.

The broad question whether the libelant might proceed in a personal action in admiralty for contribution was not before the District Judge.

Until the libel shall be amended so as to allege mutual fault and state a claim for contribution to collision damage, it should be dealt with as a libel to recover indemnity for the entire amount of the judgment for damages, costs, interest, and the amount of legal expenses which the libelant paid in the defense of the action at law.

Without such amendment the learned District Judge should not have dealt with the libel as one filed for contribution to collision damage. But even if the Judge was right in so treating it, still it was expressed to be an action to recover contribution to the amount paid upon a judgment at law, for a tort, and for certain costs and expenses incurred in connection with such judgment; and as the admiralty does not attach a maritime lien to such an action so as to support a libel *in rem*, the claim was properly dismissed on that ground, and the question of the libelant's right to sue for contribution in some other form of admiralty suit was not presented for decision.

An appeal by the libelant from the dismissal

of the libel on the ground that the cause of action stated does not give rise to a maritime lien against the vessel which will support an action *in rem* should be presented to the Court of Appeals and not to this Court.

SECOND POINT.

THE DISTRICT JUDGE PROPERLY DECIDED THAT AS THE LIBELANT WAS SUED AT LAW, HE COULD NOT COME INTO ADMIRALTY FOR CONTRIBUTION, AT LEAST, UNTIL HE HAD SATISFIED THE COURT THAT HE WAS WITHOUT REMEDY ELSEWHERE.

The libelant failed to show that he could not have obtained relief at law if the case was one in which both the Lehigh Valley Railroad Company as owner *pro hac vice* of the *Slatington*, and the Cornell Steamboat Company, as owner of the *Hedges*, were jointly and severally liable to the Rockland Lake Trap Rock Company for the damage to its boat by reason of the faults of their respective servants.

Unless both companies were chargeable with the negligence of their respective servants, no demand for contribution could be pressed in any court. If there was ground for contribution, it would seem that the railroad company could and

should have obtained relief elsewhere. Contribution is not one of the ordinary subjects of admiralty jurisdiction.

1. If the libelant had made a proper application, it could, on appropriate averments, have had the Cornell Steamboat Company made a party defendant in the original action.

The provisions of the New York Code of Civil Procedure on this subject are as follows:

"§ 452 (am'd 1901). *When court to decide controversy, or to order other parties to be brought in.*

The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment."

"§ 723 (am'd 1877, 1900). *Amendments by the court, disregarding immaterial errors, etc.*

The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it

deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceedings to the facts proved."

Under the provisions of Section 723 the Supreme Court of New York had discretionary power to grant an application to direct that the Cornell Steamboat Company be made a party defendant " in furtherance of justice " so that a complete determination of the controversy between all the parties whose rights were involved in the suit, could have been reached. *Gittleman* v. *Feltman*, 191 N. Y., 205.

In that case, after the joinder of issue, an order was made permitting the plaintiff to bring in an additional defendant which it claimed was a joint tortfeasor with the other defendants.

An appeal having been taken from this order to the Appellate Division, and the Appellate Divisions of the State being in conflict on the question, the point was certified to the Court of Appeals. Haight, *J.*, at page 208, said:

* * * " Inasmuch as this provision [§ 452] of the Code pertains to the application of persons to be brought in and made parties to the action

it does not apply to the case which we have under consideration. We must, therefore, look to the provisions of Section 723 for the purpose of determining the rights of the parties in this case. It will be observed that the provisions are very broad and cover precisely the question presented. The Court may at any stage of the action, in furtherance of justice, on such terms as it deems just, amend any process or pleading by *adding* or *striking out* the name of a person as a party. There is nothing in the provisions of this section that we are able to discover, from a careful reading of its provisions, which indicates any legislative intent that its provisions should be limited to equity actions. It is rather apparent that they pertain to all actions, whether at law or in equity, in which such an amendment would be in the 'furtherance of justice.' It is quite true that an order should not be made permitting the striking out of a sole party and the substituting of another party in his place, for the effect would be to terminate the original action and bring a new one. *N. Y. State Milk Pan Assn.* v. *Remington Agr. Works*, 89 N. Y., 22. But in cases where an action may properly be brought against two or more defendants, who were claimed to be jointly liable, or jointly and severally liable upon the claim of the plaintiff, whether it be upon a contract or a tort, we see no reason why the provisions of the Code referred to do not apply to such a case, or why such persons in a proper case may not, in the discretion of the court, be brought in and made parties to the action upon such terms as it deems just. Of course, a per-

son should not be permitted to be brought in as a party defendant, who has no connection with the other defendants, with reference to the matter in controversy, for that would but render the complaint demurrable. The true test, doubtless, is as to whether the person could have been joined as a party at the commencement of the action, and whether the plaintiff has given a satisfactory excuse for his failure so to do. The only exception that now occurs to us is, in cases where the rights of the parties have changed after the bringing of the action by subsequent transactions, in which case the provisions of the Code with reference to supplemental amendments and pleadings would apply.

" The questions certified in this case are:

" *First.*—' Should the motion of the plaintiff to bring in the Surf Amusement Company as a party defendant herein have been granted?'

" *Second.*—' Has the Supreme Court, upon the motion of the plaintiff, in an action to recover damages for personal injuries resulting from negligence, the *power* to bring in as defendant a party not named as a defendant at the time of the commencement of the action, against the objections of the defendants originally named and of the proposed new defendant?'

" The granting of a motion of this character rests in the sound discretion of the Court. It may grant, in the furtherance of justice, on such terms as it deems just. The jurisdiction of this Court is limited to the review of questions of law, and it, therefore, cannot review the discretion of

the Special Term or Appellate Division. We, therefore, have no power to answer the first question certified. The second question, however, is as to the power of the Supreme Court to grant the motion, which calls for an interpretation of the provisions of the Code referred to. With reference to this question we have the power to determine the same, and we think that it should be answered in the affirmative, and the order appealed from affirmed, with costs."

The cases of *Chapman* v. *Forbes*, 123 N. Y., 532, and *Bauer* v. *Dewey*, 166 N. Y., 402, on which the appellant relies, are distinguishable. They do not conflict in any respect with the recent decision in *Gittleman* v. *Feltman*.

In *Chapman* v. *Forbes*, the plaintiff sued in an action for money had and received. The defendant denied the indebtedness. He admitted, however, that he had received the money, but alleged that it was individual property of one Breen, whose assignee had sued to recover it. He further alleged that the fund belonged to Breen, subject to certain equities and agreements between Breen and himself, and he claimed an interest in the fund to that extent. The defendant then moved at Special Term, under Section 452 of the Code, to bring in the assignee, Williams, as a party defendant. The motion was opposed by the plaintiff on two grounds: 1, that Section 452, by its terms, did not authorize the relief

asked; 2, that the Court had no power to grant such relief as to change the character of the action from one at law to one in equity against the plaintiff's will. The Court, at Special Term, granted the motion, but on appeal to the Court of Appeals it was held that Section 452 did not apply.

Section 723, under which the case of *Gittleman* v. *Feltman* was decided, was not involved nor referred to in the case.

In *Bauer* v. *Dewey*, the action was by the plaintiff, as assignee of one Diamond, to recover commissions or compensation for the latter's services as a real estate broker. Soon after the commencement of the action, one Delack made a motion for leave to intervene under Section 452 of the Code, alleging that he was entitled to one-half the commissions owing by the defendant for such services. He further alleged that the assignment was fraudulent and made for the purpose of cheating him out of his share of the commissions. Diamond, in an affidavit, denied any fraud, and also denied that Delack was entitled to any portion of the commission, except a small amount which had been paid. On these papers the Special Term granted an order permitting Delack to intervene, directing that he should be brought in as a party defendant, and that a supplemental summons and complaint should be served upon him. On appeal from this order the Appellate Division affirmed it by a divided Court,

and subsequently certified two questions, of which the Court of Appeals held that it could only consider the following:

" Has Delack, the petitioner herein, such an interest in the subject of this action as entitles him, on his own application, to be brought in as a party defendant by the proper amendment under the provisions of Section 452 of the Code of Civil Procedure?"

It was held that the Supreme Court has no authority under Section 452 of the Code to compel the plaintiff in an action in which a money judgment only is sought, in which the title to no real, specific or tangible personal property is involved, to bring in a third party on his own application.

Section 723 of the Code of Civil Procedure was not involved, nor referred to, in the decision.

The appellant urges that the decision in *Gittleman* v. *Feltman* is merely authority for the proposition that the *plaintiff*, after the joinder of issue, may have leave to amend the proceedings by adding another party defendant. It is true that that was the only point expressly decided; but the language of Section 723 is obviously broad enough to cover an application by a defendant to have another person made a codefendant, and the reasoning of the decision shows that the Court of Appeals considered the section broad enough to cover any case where, in the discretion

of the Court, the addition of another party defendant would be "in the furtherance of justice."

In the absence of an application for relief by the addition of the Cornell Steamboat Company as a party defendant in the original action it should not be assumed that the Court would have refused to exercise its power by directing that such party be brought in so that in the "furtherance of justice" the rights of all parties could be determined in a single proceeding.

If the libelant neglected to have its alleged right of exoneration or contribution litigated and determined in the original action by bringing the Cornell Steamboat Company into the case as a codefendant, it should not now be permitted to escape the consequences of its inaction by attempting to continue the litigation in a different forum.

2. It does not appear that the railroad company exhausted the usual remedies before seeking indemnity or contribution in admiralty.

The rule that there is no contribution among wrongdoers does not apply where one is a tortfeaser only by inference of law. It is confined to cases where one knows, or is presumed to know, that he is doing an unlawful act. *Pollock on Torts*, 6th Ed., p. 195.

The owner of the *Slatington* was a wrongdoer

by inference of law only. It was held liable for the faults of its servants. The allegations of the libel, assuming them to be true, indicate that the owner of the *Hedges* was a wrongdoer only in the same sense. The current of modern anthority suggests that as between wrongdoers of that class contribution may be recovered.

In *Ankeny* v. *Moffett*, 37 Minn., 109, Moffett and Johnson were engaged in building a house. A part of the building fell and injured one Walters. Neither Moffett nor Johnson was guilty of any intentional wrong, or of any bad faith, or of any act illegal in itself. The ground of their liability was mere negligence. Although the case turned on the construction of a statute, the Court said:

"Whether the statute cited was intended to change the rule that there can be no contribution among wrongdoers, it is unnecessary to consider. That rule is applicable only where the person seeking the contribution was guilty of an intentional wrong or at least, where he must be presumed to have known that he was doing an illegal act."

The case of *Armstrong County* v. *Clarion County*, 66 Pa. St., 218, where a bridge which was maintained by the two counties was the cause of the injury holds that the rule of no contribution as between wrongdoers is confined to cases where the plaintiff must be presumed to know that he was doing an unlawful act.

In *Horbach's Admr.* v. *Elder*, 18 Pa. St., 33, five persons are engaged in running a line of stages along a road, for designated parts of which, stages, horses and drivers were to be provided by each at his own expense. Through the carelessness of one of the drivers, the stage was overturned and several of the passengers were injured. For these injuries suits were brought against all the proprietors. Two of the defendants paid about half of the liability. It was held that contribution would lie. The Court based its opinion on the following principle, citing Storey's Equity Juris., I, page 545:

"The right to contribution in equity exists where all are equally bound and are equally relieved; all, therefore, should contribute towards a benefit done to all."

In *Nickerson* v. *Wheeler*, 118 Mass., 295 (1875), liability of a corporation arose because of the neglect of the president and directors to file the annual certificate as required by statute. A decree was entered against the defendants jointly and severally. Levy and execution were had against the president and he paid the judgment. Contribution was allowed. The Court said:

"But although one may have been made liable in tort, he is not necessarily deprived of contribution from another also originally liable, where the foundation of the action is simply negligence on

the part of each in carrying on some lawful transaction. Thus where one or two coach proprietors had been made liable in tort to a party who was injured by the negligence of a servant employed by himself and another, he was entitled to contribution from his coproprietor. *Wooley* v. *Batte*, 2 C. & P., 417. Both were engaged together in lawful business, and the negligence of which they were guilty, in employing a servant from whose misconduct injury resulted, did not place them in such position that they were treated as wrongdoers, whose action against each other could only be founded in their community of wrong. The cases of *Oakes* v. *Spalding*, 40 Vt., 347, and *Spalding* v. *Oakes*, 42 Vt., 343, relied on by the defendants do not conflict with this. The parties to the transaction there were engaged in what was a wrongful act as against any one injured thereby, namely keeping a vicious animal, and the neglect to take care of it, by reason of which it did injury, was not an act of non-feasance merely; the whole act of keeping it was one of misfeasance."

In *Herr* v. *Barber*, 2 Mackey, 545, the limitation is stated as follows:

"The principle that there can be no contribution, at law, enforced by one joint *tort-feasor* against the other wrongdoers, is limited by the modern authorities to cases where the transaction, out of which the judgment arises, involves moral turpitude."

The case held that a breach of trust was such a moral wrong as would not permit contribution.

In *Johnson* v. *Torpy*, 35 Neb., 604, the rule is stated as follows:

"In determining whether the right of contribution exists in favor of one wrongdoer against another, the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful? If not, he may recover against one equally culpable, but otherwise he is without remedy."

To the same effect:

Bank v. *Avery Co.*, 69 Neb., 329.

In *The Hudson*, 15 Fed. Rep., 162, Brown, *J.*, stated the rule as follows:

"In *Arnold* v. *Clifford*, 2 Sum., 238, Story, *J.*, states the rule (that there is no contribution among joint wrongdoers) differently. 'Among joint tortfeasors,' he says, 'who are knowingly such, there can be no contribution.' This rule doubtless applies to persons directly participating in or authorizing any wilful trespass, or any known wrongful acts, or acts obviously of an unlawful character, and to actions involving moral turpitude or incurring statutory penalties. But in *Adamson* v. *Jarvis*, 4 Bing., 66, Best, *C. J.*, says: 'The rule is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act'; and it seems to be settled law that in cases of *quasi* torts only, not involving any moral turpitude or any personal fault, or where the acts are not obviously unlaw-

ful, or the parties are not presumed to have known they were doing any wrong, or where the liability is by implication of law merely, then contribution or indemnity will be enforced."

In *Bailey* v. *Bassing*, 28 Conn., 455, the Court said:

"The rule that there can be no contribution among wrongdoers, has so many exceptions that it can hardly with propriety be called a general rule. It applies properly only to cases where there has been an intentional violation of the law, or where the wrongdoer is to be presumed to have known that the act was unlawful."

In *Chesapeake & Ohio Canal Co* v. *County*, 57 Md., 201, the rule is stated thus:

"In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."

Similar principles are enumerated in *Acheson* v. *Miller*, 2 Ohio St., 203; *Upham* v. *Dickinson*, 38 Mich., 338.

The case of *Eaton & Prince Co.* v. *Trust Co.*, 123 Mo. App., 131 (1906), was decided on a stat-

ute which provided for contribution; but the law is stated as follows:

"The tone of the decisions supports the doctrine that in the instance of a negligence tort, when there was no intentional wrong or moral guilt, but two or more tort feasors were actually to blame in fact as well as in law, there can be contribution."

Certain New York cases denying the right to contribution between trustees of corporations in respect of liabilities arising from the failure to file reports as required by statute, appear to rest on the ruling that "the policy of the law is to leave each one to the consequences of his own negligence in order to insure stricter attention on his part." *Andrews* v. *Murray*, 33 Barb., 354. No contribution is permitted where the wrongdoing has been intentional or conscious, *Gilbert* v. *Finch*, 173 N. Y., 455; *Kolb* v. *National Surety Co.*, 176 N. Y., 233; but we are not aware of any authority in New York which is actually at variance with the rule as above stated in the decisions of other States, with regard to contribution between wrongdoers by inference of law.

The appellant contends that the decision of this Court in *Union Stock Yards* v. *Chicago, Burlington and Quincy Ry.*, 196 U. S., 217, is an authority opposed to the notion that contribution could be recovered outside of admiralty on the allegations of the libel in this case.

In that case a brakeman employed by the Terminal Company was injured by reason of a defect in a freight car delivered to it by the Railroad Company, which had been put in service without inspection either by the Railroad Company, or the Terminal Company. An inspection would have discovered the defect. There was nothing to show that the defect had arisen from any negligence or misconduct of the Railroad Company, which had received it from some other railroad. The certificate on which the case came to this Court indicated that the Railroad Company and the Terminal Company were guilty of a like neglect of duty in failing properly to inspect the car. The neglect of the Terminal Company seems however to have been subsequent in time to the fault of the Railroad Company, and if the Terminal Company had performed its duty the consequences of the previous fault of the Railroad Company would have been avoided. The case was not one of a joint tort.

The brakeman recovered a judgment against the Terminal Company which thereupon sued the Railroad Company.

The question certified was whether or not the Railroad Company was "liable to the Terminal Company for the damages which the latter has been compelled to pay to one of its employees on account of injuries he sustained by reason of the defect" in the car.

This Court said:

"The Terminal Company by reason of its fault has been held liable to one sustaining injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another."

The case is one of several torts, committed at different times. In substance it was an action for complete indemnity. The proximate cause of the injury to the brakeman seems to have been the breach of duty of his own employer alone. We do not understand the decision to hold that in cases of joint tort when the wrongdoing charged against the parties arises by inference of law there can be no contribution.

THIRD POINT.

THE LIBELANT IS NOT ENTITLED TO RECOVER A CONTRIBUTION IN ADMIRALTY IN RESPECT OF A COMMON LAW JUDGMENT.

Though the plaintiff might originally have proceeded against the *Slatington* or the *Hedges*, or both, in admiralty, it had an undoubted right to proceed at law, and the Railroad Company has no ground of complaint, because the consequences

of the election exercised by the plaintiff may be different from those which would have followed if the plaintiff had elected to proceed in another forum. As was said by Mr. Chief Justice Waite in *Schoonmaker* v. *Gilmore*, 102 U. S., 118:

"The Judiciary Act of 1789, 1 Stat. at L., 73, sec. 9, reproduced in sec. 563, R. S., par. 8, which confers admiralty jurisdiction on the Courts of the United States, expressly saves to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. That there always has been a remedy at common law for damages by collision at sea, cannot be denied."

If the owner of the scow had sued the *Slatington* in admiralty, and had recovered its entire damages, the owner of the *Slatington*, if the *Hedges* was also to blame, would have become subrogated to the original libelant's claim against the latter vessel, and could have maintained a libel in admiralty for contribution. *The Mariska*, 107 F. R., 989; *Erie Railroad Co.* v. *Erie Transp. Co.*, 204 U. S., 220; *The Juniata*, 93 U. S., 337, 340, support this view. This result arises from the rule that under the maritime law collision damage is a common loss upon all vessels whose faults have contributed to the damage. Admiralty Rule 59, recognizing this doctrine, provided a way for bringing all vessels charged with fault before the Court, so that the rights and liabilities of all par-

ties concerned in the collision could be adjudicated in a single proceeding. And if one vessel is absent so that it cannot be brought in under Rule 59, contribution for its share of the loss may be obtained by a separate suit.

There is no authority, however, for the proposition that because the plaintiff might originally have sued to recover compensation under the maritime law, a judgment which he has obtained by pursuing his rights at common law may still be used as the basis of an action for contribution in admiralty.

Under the common law a damage caused by collision is not the common loss of the owners of all the vessels which may have contributed to it. If the owner of one vessel in fault sues the owner of another vessel in fault, at common law, the plaintiff's fault bars his right of recovery; and if his boat suffered the entire damage caused by the collision he will have to bear it. And it is manifest that if such a plaintiff should pursue his common law remedy, and fail to recover from the owner of the other guilty vessel because of his own fault, he could not, afterwards, maintain a libel in admiralty, in order to make the loss a common one. The consequences that follow from an action by a party who has a right to maintain it at law for collision damage, may be quite different from those which result from a suit under the admiralty law.

In this case, the plaintiff recovered a judgment on a common law claim for a tort. The original claim became merged in the judgment. Payment of the judgment at law by the defendant in the action extinguished the claim altogether, and if there be no contribution at law, or in equity, between joint tortfeasors, whose faults may have concurred in causing the damage, the payment of the judgment by one tortfeasor operated to release the claim as to other alleged joint tortfeasors. *Selz* v. *Unna*, 6 Wall., 327, 335.

A defendant by paying a judgment obtained against him for a tort at common law does not become subrogated to the plaintiff's original right against another who might also have been sued as a joint tortfeasor.

Without such subrogation (which would follow from the payment of a decree against one of the two joint tortfeasors sued in admiralty) the defendant, who has paid a common law judgment, has no cause of action against his co-tortfeasor on the plaintiff's original claim.

Cases have been cited under the preceding point to the effect that if defendant is a tortfeasor by inference of law merely, as where he is held liable for the faults of his servants, a right of contribution exists against another wrongdoer who might originally have been sued jointly with him in the same cause of action. But if it be considered that those cases are not well founded,

and that no right of contribution in respect of a judgment obtained at law in a tort action exists at law or in equity, then a defendant sued on a tort at law is left to bear the entire burden of any judgment that may be rendered against him.

If this be a hardship in a case where different consequences might have followed if the original plaintiff had elected to sue under the maritime law instead of under the common law, it results from the Act of Congress, which reserves a common law remedy to the plaintiff in such cases. A hardship resulting from the operation of an act of Congress affords no proper ground for extending the admiralty jurisdiction to a case of contribution in respect of a common law judgment which has been paid and satisfied.

LAST POINT.

THE APPEAL SHOULD BE DISMISSED, OR, IN THE ALTERNATIVE, THE DECREE APPEALED FROM SHOULD BE AFFIRMED.

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J. PARKER KIRLIN,
Counsel.

New York, October 25, 1910.